72-691

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 691

AMERICAN TRIAL LAWYERS ASSOCIATION, NEW JERSEY BRANCH, *et al.*, PHILIP G. AUERBACH, *et al.*,

Appellants,

v.

NEW JERSEY SUPREME COURT,

Appellee.

On Appeal From the United States District Court for the District of New Jersey

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

PAGE

POINT I—On this record, appellee's claim that the court below was without jurisdiction because of the lack of a substantial question constitutes an attempt, impermissible in the posture of this case, to obtain from this Court summary adjudication, without briefs or argument, of the ultimate merits of the case 2

POINT II—On this record, appellee's claim that the court below was without jurisdiction because of the lack of a substantial question amounts to an impermissible attempt to appeal to this Court from the judgment in its favor which appellee obtained below 5

Cases Cited

Bailey v. Patterson, 369 U. S. 31 (1962) 2, 5

Calhoun v. Massie, 253 U. S. 170 (1920) 4

Ex parte Porefsky, 290 U. S. 30 (1933) 3

Gair v. Peck, 6 N. Y. 2d 97, 160 N. E. 2d 43 (1959), appeal dismissed, cert. denied, 361 U. S. 374 (1960) 4

Gold v. DiCarlo, 235 F. Supp. 817 (S. D. N. Y. 1964), affirmed, 380 U. S. 520 (1965) 3

Jordan v. American Eagle Fire Insurance, 169 F. 2d 281 (D. C. Cir. 1948) 4

Perez v. Ledesma, 401 U. S. 82 (1971) 6

Phillips v. United States, 312 U. S. 246 (1941) 3, 4

PAGE

Southern Railway Co. v. Virginia, 290 U. S. 190 (1933) 5

Thompson v. Louisville, 362 U. S. 199 (1960) 3

Turner v. City of Memphis, 369 U. S. 350 (1962) 2

Water Service Co. v. Redding, 304 U. S. 252 (1938) 2

Yeiser v. Dysart, 267 U. S. 540 (1925) 4

Statutes Cited

28 U.S.C.:

Sec. 1253 2

Sec. 2281 2

Rules Cited

Rule 1:21-7(c) 3,4

Rule 1:21-7(e) 4

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POINT I

On this record, appellee's claim that the court below was without jurisdiction because of the lack of a substantial question constitutes an attempt, impermissible in the posture of this case, to obtain from this Court summary adjudication, without briefs or argument, of the ultimate merits of the case.

Of course it is true that 28 U.S.C. § 2281 is inapplicable, and an appeal does not then lie to this Court under 28 U.S.C. § 1253, if the federal constitutional question presented is wholly without substance. But it can only be an extraordinary and utterly obvious case in which this Court, proceeding merely on the jurisdictional papers, will in effect overrule a lower court that did see briefs and hear argument, and hold that the question presented below so entirely lacks substance as to deprive federal courts of jurisdiction. It may be that the jurisdictional papers can give enough of the flavor of a case when the appeal is taken on the merits. In the instant case, the question presented on appeal and discussed in the Jurisdictional Statement does not concern the merits.

The extraordinary case in which dismissal may be ordered for lack of a substantial question is one unquestionably covered by prior or intervening decisions of this Court. That was the situation in *Bailey* v. *Patterson*, 369 U. S. 31 (1962). It was the situation also in *Turner* v. *City of Memphis*, 369 U. S. 350 (1962), but in that case this Court had received briefs on the merits and had heard argument. It was the situation as well in *Water Service Co.* v. *Redding*, 304 U. S. 252 (1938), which was disposed of summarily. But in *Redding* the court below had itself held that the question lacked substance because

it was identical with one adversely decided by this Court, and this Court affirmed. Compare *Gold* v. *DiCarlo,* 235 F. Supp. 817 (S. D. N. Y. 1964), decided on the merits by a three-judge court and affirmed by this Court, 380 U. S. 520 (1965).

No decision of this Court or of any other court so disposes of the questions presented on the merits of this case as to deprive a federal court of jurisdiction to decide them. Appellee's Brief in Support of Motion to Dismiss or Affirm offers a caricature of the contentions made below by appellants, which District Judge Barlow, who received briefs and heard argument on the merits deemed substantial, *Ex parte Porefsky,* 290 U. S. 30 (1933), and which the three-judge court, again on the basis of briefs and arguments, also found to be substantial, as appellee concedes, see Brief in Support of Motion to Dismiss or Affirm, at p. 6.

Appellee treats in a single paragraph, and misstates, what the court below called—and what in truth is—appellants' primary contention on the merits, concerning the authority of the Supreme Court of New Jersey to promulgate Rule 1:21-7(c). See Jurisdictional Statement, Appendix A, at p. 3(a). Appellants contended that Rule 1:21-7(c) is a "lawless exercise of authority," *Phillips* v. *United States,* 312 U. S. 246, 252 (1941); that it was based, not upon a dubious, erroneous, or even wholly implausible construction of the provisions of the New Jersey Constitution which are said to authorize it, but actually upon no claim of statutory or constitutional authority at all; and that for this reason Rule 1:21-7(c) violates Due Process as an arbitrary action, just as the judgment in *Thompson* v. *Louisville,* 362 U. S. 199 (1960), violated Due Process, not because it raised a question of "the suf-

ficiency of the evidence" (which would be equivalent to a question of erroneous construction), but because it rested "upon [no] evidence at all" (which is equivalent to the arbitrary action in this case).

No decision of this Court concludes this issue. Rather *Phillips* v. *United States, supra,* suggests its substantiality. And no decision of any other court concludes this issue. The State statutory and constitutional position was, of course, different in *Gair* v. *Peck,* 6 N. Y. 2d 97, 160 N. E. 2d 43 (1959), *appeal dismissed, cert. denied,* 361 U. S. 374 (1960), and the New York Court of Appeals construed the rule there involved as not making substantive law, but as merely supplying "a procedure for determining on the basis of the real facts whether a lawyer is subject to discipline," a procedure having "merely presumptive effect, like a burden of proof which pertains to procedure and is not substantive law." 6 N. Y. 2d at 104, 114, 160 N. E. 2d at 47, 53. New Jersey Rule 1:21-7(e), by contrast, declares that paragraph (c) of the Rule "is intended to fix maximum fees."

It is not necessary or appropriate in the present posture of the case to discuss at any length the other claims made by appellants below. It may be noted merely that *Yeiser* v. *Dysart,* 267 U. S. 540 (1925), and *Calhoun* v. *Massie,* 253 U. S. 170 (1920), do not in themselves govern other Due Process claims made by appellants, because these cases concerned the direct fixing of fees by the legislature in relation only to special statutory causes of action newly created by it. As to the necessity for a hearing if Rule 1:21-7(c) is regarded as an administrative rate-making order or an exercise of disciplinary power, appellants relied on such cases as *Southern Railway Co.* v. *Virginia,* 290 U. S. 190 (1933); and *Jordan* v. *American Eagle Fire Insurance,* 169 F. 2d 281 (D. C. Cir. 1948).

To be sure, a question may conceivably be deemed insubstantial in the jurisdictional sense even though not adversely covered by an applicable precedent (as the questions in this case are not), if it is, in appellee's word, frivolous—presumably on its face. But it is nothing short of indeed frivolous to contend, in the absence of applicable precedent, cf. *Bailey* v. *Patterson, supra,* that questions which a district judge found to be substantial on the basis of briefs and arguments, and which on a like basis a three-judge court found to be substantial, are so obviously and totally devoid of merit that this Court may so hold them without benefit of briefs and argument. Appellee's contention shows a marked lack of regard for the function and responsibility of the court below.

POINT II

On this record, appellee's claim that the court below was without jurisdiction because of the lack of a substantial question amounts to an impermissible attempt to appeal to this Court from the judgment in its favor which appellee obtained below.

Appellee moved in the court below "to dismiss the complaint for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted." The court below granted the motion to dismiss, but did so on the ground of abstention. Appellee now moves in this Court for precisely the judgment of dismissal for lack of jurisdiction which it failed to obtain from the court below.

But appellee was the successful party below, even if not successful on the ground it would have preferred, and it cannot properly maintain an appeal. Yet that is exactly

what appellee is now attempting to do. This Court's holding in *Perez* v. *Ledesma,* 401 U. S. 82, n. 3 (1971) is precisely apposite: "The State successfully opposed an injunction . . . in the court below and now cannot appeal from its victory. See *Gunn* v. *University Committee to End the War in Viet Nam,* 399 U. S. 383, 391 (1970) (White, J., concurring)."

Respectfully submitted,

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